Oregon
Kate Brown, Governor

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Mr. Jeffrey S. Steinberg
Deputy Chief
Competition and Infrastructure Policy Division
Federal Communications Commission

Re: Comments by the Oregon State Historic Preservation Office on the proposed rulemaking regarding Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment (WT Docket No. 17-79).

Mr. Steinberg,

Please find, below, the comments of the Oregon State Historic Preservation Office, regarding the proposed rulemaking around the above-identified proposals and comments requests for the further streamlining of cultural resource review for wireless technology deployment. Our effort here is to provide our office's views on some of the ideas proposed and questions raised in the document.

1: Re: Response Time

General comment – the FCC seeks to reduce response time for applications by reducing the amount of time allowed for certain types of undertakings (FCC applications). If enacted, the result would reasonably be the prioritization of FCC undertakings over those of other agencies. Those other agencies would likely not appreciate the FCC "butting to the front of the line," and lengthening the review time for their undertakings. At the Oregon SHPO, and at dozens of other SHPOs (as demonstrated on the May 22 conference call), the primary element affecting review times for federal undertakings is the availability of staff time to review. A far, far more effective means of reducing the review time for FCC' undertakings, as well as those of all other federal agencies', would be to expand the funding provided to SHPOs for staff. The addition of one position at the Oregon SHPO would dramatically reduce the average review time. We propose that it would be in the interest of FCC (and by extension, the federal government as a whole) to spend $5 Million/year (a rough estimate) to fully fund an additional regulatory compliance staff position in all 50 states, and thereby improve response times across the board. Perhaps the carriers could pool their substantial resources to provide such funding for review staff.

Paragraph 18 – reducing CLG review time from 90 days to 60 days

We are concerned that reducing the available response time for local governments to respond by a third might reduce their ability to respond at all, especially those that conduct such reviews at scheduled (often monthly or bimonthly) public meetings. Such a reduction might limit their ability to table a decision on an application pending additional information, and force a decision that may be based on incomplete or faulty information (Oregon SHPO routinely receives FCC applications that contain factually incorrect data). Oregon SHPO relies on its Certified Local Governments and other local reviewing agencies to provide the perspective of local stakeholders, a crucial element in any environmental review process, given the outsized burden they bear as the affected population.

Broadly, Oregon SHPO opposes basing the length of the allowed review period on the height of a proposed installation, because the height (and thereby the size of the Area of Potential Effect) is only one of several factors that affects the review time. Most notably, the density of historic resources within an APE has a much greater effect on the review time than the height of the tower. In urban settings, or areas of special historic significance, there may be many dozens of affected resources within a relatively small APE for a short tower (requiring a relatively lengthy review time), while a much taller tower in rural setting that may have very few historic resources (requiring a relatively brief review time).

Paragraph 20 – when review period should begin

Oregon SHPO suggests that the review period should begin on the day that our office reviewers are able to obtain a complete application and begin review. For example, if an application is posted to the FCC E-file website, at 11pm, it is not reasonable to establish that day as the beginning of the review period, as the SHPO has no ability to review it that day. Any such rule should account for time zones, and established "business hours" (8am-5pm, local time, for example).

Paragraph 23 – The Oregon SHPO objects to the assertion that the ongoing evolution in wireless infrastructure trends toward small antennae and supporting structures. While this may be the case overall, it has been our experience that moving from one technology to the next (for example, 3G to 4G) has resulted in much larger antenna panels, as well as more installation sites resulting from a shorter range. During its deployment, 3G panels did indeed trend smaller, resulting in quite easy reviews for replacement of outdated panels with newer ones, but the switch from 3G to 4G did not continue that trend. It may be that the ongoing deployment of 4G panels will result in smaller panels over time as that technology is refined, but we anticipate the move to 5G and beyond will likely continue the trend of larger panels at initial deployment.

Paragraphs 33 and 34 – updating approach to the NHPA and NEPA

Oregon SHPO is not especially moved by the assertion of private service providers that complying with the historic preservation and other environmental regulations takes time and costs money. Such is the nature of all regulations. The legitimacy and ability of the government to impose regulations for the protection of the human environment is well established in law. It is established that the United States government recognizes and acknowledges the importance of historic and cultural resources in acts of Congress and orders issued by the executive branch, and provided these as a means to provide for consideration of impacts to them resulting from undertakings of the federal government.

Paragraph 39 – updating approach to the NHPA and NEPA

Oregon SHPO reviews FCC undertakings in the same way that it does for those of all federal agencies. There are no fees for review, and agencies' applications for review are generally reviewed in the order in which they arrive. If there are delays in deployment due to SHPO review, it is generally because we lack the staff to handle all of the reviews we receive, or because we are being provided with incomplete or inaccurate information for our review, requiring a request for additional information, thereby stopping the 30-day "shot clock" review period, and resetting it when additional information arrives. It is our suggestion that applicants pay closer attention to the skills and abilities of their hired consultants to ensure that all requirements are met and that additional information is not required.

Regarding the concurrent review of CLG's and SHPO, we refer to our prior comment on the importance of the input of local reviewing bodies. In addition to this, local reviewing bodies also have knowledge of and provide comment on historic and cultural resources of local significance (i.e., locally designated historic landmarks) that the SHPO does not manage. Therefore, cutting the review of CLG's would have the result of putting locally important resources at risk. The SHPO, on the other hand, has a deep understanding and familiarity with federal regulations, generally owing to the required qualifications of its staff. Those who sit on local review boards are not required to, and often do not have such understanding and familiarity, nor do they necessarily have such qualifications. In short, what appears to be a redundant review process is actually a two-part process that ensures that the things important to communities are adequately considered during the review period.

(i) Tribal fees

Oregon SHPO has no comment on tribal review fees. Please engage with those sovereign tribal governments to see if any agreement on fees can be reached.

Paragraph 53 - Geographical Areas of Interest

The Oregon SHPO has no comment on the definitions of tribal areas of interest. Please engage with those sovereign tribal governments to see if any agreement on this can be reached. We also have no comment on whether TCNS should retain information on previously lodged objections made by sovereign governments. What information they provide, and to whom is wholly among the rights and responsibilities of those governments, and not those of the government of the State of Oregon.

Paragraphs 62 and 63 - Batching

The Oregon SHPO does not believe that batching of review submissions for review would improve response times, as each proposed undertaking would still necessarily require complete Section 106 review. In fact, it seems that batching would likely increase delays, as a problem with approval of one tower would potentially hold up the approval of others with which it is batched. There may be certain circumstances where batching may improve efficiency, such as when submitting reviews for undertakings where no resources exist within the APE, but this may not necessarily be the case. In general, the most efficiency we've seen from batching comes from the batching of PTC poles where exemption is being asserted, and is well-supported. It is worth noting that even in these cases, the efficiency is not achieved in the review itself, but in the correspondence and administration.

Paragraph 68 – Pole replacements

OR SHPO opposes exempting review of pole replacements with exceptions based on size, especially those within historic properties or historic districts. It is not only the size of a pole that can affect the character of the built environment around it – the materials, color, shape, and other characteristics can all have such an effect. It is also true that such poles can actually be contributing elements to a historic district (historic street lights, for example), and replacement of those with a modern light pole of similar size to hold a cell installation would necessarily be an adverse effect, unresolved if the replacement is exempt from review, as it would be under this proposal.

Paragraph 69 – Rights of Way

OR SHPO opposes extending the right of way exemption to apply to towers located in transportation rights of way. The current exemption is explicitly based on the idea that the presence of other structures (overhead utility lines, other telecommunications towers) within close proximity has already compromised the historic setting or viewshed of any historic properties that would otherwise be affected. This is emphatically not the case with transportation rights of way, which generally lie flat to the ground, and which would not affect setting or viewshed materially. In other words, the current exemption applies only to specific types of rights of way, and treating all rights of way as the same would be a serious error.

Paragraph 70 – Rights of Way

DAS collocation installations are treated as according to the August 3, 2016 amendment to the Nationwide PA. Small cell and DAS on new towers built for the purpose should be reviewed according to the procedure for all new towers, as the impact is from the tower, not the antenna. None of the proposed installation methods (auguring, plow, directional drilling) would do anything other than destroy or damage archaeological sites, and should never be the basis for an exemption. Oregon SHPO sees no opportunities for streamlining proposed in this section that would represent a streamlining over the existing methodology established in the Nationwide PA, while still providing adequate protections to historic properties.

Paragraph 76 – Scope of undertaking and Action

Under federal regulations, there is no direct tie between the umbrella environmental regulation NEPA and the NHPA, which informs it. It would not be reasonable to assume that absent a NEPA EA-triggering condition must be present to trigger NHPA review, precisely because NHPA is among the several environmental laws that inform NEPA. In other words, one wonders how we would know if an EA-triggering condition exists without at least some cursory application of NHPA. It is also worth mentioning that NHPA is required for federal undertakings, regardless of whether NEPA is fully applied.

The Oregon SHPO believes that development and application of specific exclusions from review would be a more appropriate way to determine suitability for review than would be the implementation of any classification regime. First, application of exclusions allows for the development of very specific conditions that must be met for an exclusion to apply, ensuring a minimum of "gray areas" that might make decisions around application of review unclear. Second, due to significant variability among installations, as well as continuing evolution of technology and deployment techniques, keeping classifications relevant will be difficult, and will almost certainly result in challenges to the classification system developed that will likely need to be resolved in court.

Paragraph 77 – Scope of Undertaking and Action

With regard to the specific question, "How does the requirement to perform environmental and historic preservation review prior to construction apply when the licensee is not the tower owner?," the Oregon SHPO refers to NEPA elements that address separation of inherently-related elements (also known as the "but for" clause). It is clear that no reasonable person or entity would build or cause to be built a communications tower that it does not intend to turn on, which would require an FCC license. This is rather like a proposal to construct a powerplant without applying for any FERC license, because it has not yet been energized. SHPO has no specific opinion on whom (the owner or the carrier that uses it) should pay for or conduct the pre-construction review, so long as it is done. If the owner wishes to try to recoup their

investment (in terms of regulatory costs), than is up to them to negotiate with the carriers. As long as FCC will not license a tower that has not gone through environmental review, then the owner is likely going to have to foot the bill, at least initially, to get the environmental review completed, otherwise it may find it difficult to find carriers to locate on their towers.

Paragraph 82 – Collocations on Twilight Towers

Regarding the FCC's note that the vast majority of towers that have been reviewed under the NPA have not resulted in adverse effects, the Oregon SHPO regards that assertion as both misleading, and irrelevant. First, many projects that have undergone review by the SHPO avoid adverse effects as a result of consultation; that is, the SHPO or some other entity has identified a potential source of adverse effect, and through consultation, the Scope of Work has been adjusted to avoid such adverse effects. The FCC would not necessarily know that this is the case. Second, in many cases where consultation did not take place under NHPA, SHPO does not know that a tower has even been constructed until much later, often when a collocation is subsequently proposed. It is not unknown in Oregon for this to occur, and post-hoc evaluation of effects resulting from the initial construct was found to have caused unresolved adverse effects. In such cases, the FCC likely was also unaware that this had taken place. Finally, the purpose of requiring consultation under NHPA to begin with is to reduce the risk of adverse effects to significant historic and archaeological resources resulting from federal undertakings. Therefore, not only do we expect the number of adverse effects to be relatively low (assuming we have successfully done our jobs), but the other side of that is that without said review, those numbers would likely be higher, meaning that federal undertakings would have resulted (and will result, should the review requirement be abandoned) in more unresolved adverse effects. In other words, just because the FCC doesn't know that they've happened, doesn't mean they haven't, and certainly doesn't mean that they won't if FCC stops looking entirely.

Paragraph 83 – Collocations on Twilight Towers

The Oregon SHPO's comment on the concerns voiced by Tribal Nations is that the concerns are valid, and should be addressed by the FCC. Regarding the question about the likelihood that unresolved adverse effects can be mitigated when discovered, even in a post-construction scenario, we regard this likelihood as very high, evidenced by the fact that it has been done. Regarding the likelihood that a new collocation would exacerbate the adverse effect, we regard the question as irrelevant, because the issue at hand is a non-compliant tower, and that approval of additional communications equipment should not be approved by FCC based on the tower's non-compliant status.

Paragraph 84 – Collocations on Twilight Towers

The Oregon SHPO objects to considering market factors when determining compliance with applicable laws.

Paragraphs 88-91 – Intersection of Sections 253(a) and 332(c)(7)

Our understanding of the passages cited in Sections 253(a) and 332(c)(7) are intended to prevent monopoly. Our concern is that FCC is reading these as a means to suggest automatic approval of collocations at sites where collocations have been approved in the past. Oregon SHPO strongly objects to this interpretation, as it puts in danger one of the more crucial elements of NHPA, specifically the idea of "cumulative effects." In one specific case in Oregon a historic water tower, listed in the National Register as a part of a historic industrial complex, because a structure on which carriers began to apply for collocation. Because the initial carriers placed a relatively limited number of antennae and other equipment on the catwalk rail, Oregon SHPO found No Adverse Effect. As additional carriers subsequently placed antennae on the same rails, the water tower itself became increasingly difficult to see, for all the communication equipment. At last, the SHPO found that a proposal adding yet more panels would obscure the historic structure such that an adverse effect would be realized, not by the individual collocation, but by the cumulative effects of many such collocations. The proposed interpretation of these sections made by the FCC would have result of eliminating the allowance of finding cumulative adverse effects. One wonders, in this scenario, whether knowing that once one carrier has been allowed to collocate on a historic structure, that subsequent collocation could not be denied might lead SHPOs to reasonably reject any such collocations at all.

Finally, it is important to note that NHPA cannot "deny" an undertaking of any kind. The most that can happen is a finding of adverse effect requiring mitigation. We are concerned that FCC might interpret a finding of adverse effect as "having the effect of prohibiting" service, when it plainly does not, but rather reflects an objection of the SHPO with the scope of work. FCC may, of course, override the SHPO's opinion this matter, but it would not change the fundamental fact of the situation.

Paragraph 92 – "Prohibit or have the effect of prohibiting"

Under NHPA, "aesthetic" considerations alone cannot be considered, outside of a firm grounding in the criteria of adverse effect established in 36 CFR 800. Local review processes may vary, but this is outside our considerations.

Paragraphs 93-94 – "Prohibit or have the effect of prohibiting"

The Oregon SHPO does not impose fees of any kind to applicants for any of our programs, regulatory or otherwise.

We look forward to working with the FCC and other SHPOs and THPOs on review of these proposals. If you have any questions, or would like to discuss, please feel free to contact our office.

Sincerely,

Ian P. Johnson
Associate Deputy State Historic Preservation Officer
Oregon State Historic Preservation Office